Nos. 11-338, 11-347

In the
Supreme Court of the United States

DOUG DECKER, in His Official Capacity as Oregon State Forester, *et al.*, *Petitioners*,
v.
NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *et al.*, *Respondents*.

GEORGIA-PACIFIC WEST, INC., *et al.*, *Petitioners*,
v.
NORTHWEST ENVIRONMENTAL DEFENSE CENTER., *et al.*, *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF ALABAMA FORESTRY ASSOCIATION, et al., IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Ninth Circuit should have deferred to EPA's long-standing position that channeled runoff from forest roads does not require a federal NPDES permit under the Clean Water Act, and erred when it mandated that EPA must regulate such runoff as industrial storm water subject to the Clean Water Act.

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Butler, Brett J., *Family Forest Owners of the United States, 2006* (U.S. Forest Serv. 2008), *available at* http://nrs.fs.fed.us/pubs/gtr/gtr_nrs 27.pdf (last visited Oct. 2, 2011) 14

EPA Web site on nonpoint source BMPS for forestry, *available at* http://www. epa.gov/ owow_keep/NPS/forestry.html (last visited Oct. 14, 2010) 10

EPA nonpoint source program Web site, *available at* http://www.epa.gov/ owow_keep/NPS/cwact.html (last visited Oct. 2, 2011) 10

Smith, W. Brad, *et al.*, *Forest Resources of the United States, 2007* (2009), *available at* http://nrs.fs.fed.us/pubs/ 7334 (last visited Oct. 2, 2011) 13

IDENTITY AND INTEREST OF AMICI CURIAE

Under Supreme Court Rule 37, Amici respectfully submit this brief in support of Petitioners Doug Decker, Oregon State Forester, *et. al.*, 11-338, and Georgia-Pacific West, Inc., *et. al.*, 11-347 (consolidated).[1]

The Amici organizations hail from all over the country and represent forest landowners, wood producers, conservationists, educators, and others. Many Amici are involved in developing, using, or maintaining forest roads. They have joined this brief because of their justifiable fear that the Ninth Circuit decision will unnecessarily change forest practices nationwide at great expense but with no added benefit to the environment.

The Alabama Forestry Association was organized in 1949 to promote good stewardship of renewable forest resources for the benefit of the Nation. The Association pursues this goal through public outreach, safety training, industry communications, legislative advocacy, and policy development. The Association has more than 1,800 dues-paying members, including landowners, foresters, trucking companies, and wood product producers. The Association represents the

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[1] In accordance with Rule 37, all parties have been given timely notice of Amici's intent to participate in this case and all parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court.

Also, under Rule 37.6, Amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici, their members, or their counsel have made a monetary contribution to the brief's preparation or submission.

State's largest industry that supports over 400,000 forest landowners with an estimated $15 billion in products from over 650 producers.

The American Loggers Council was formed in 1994 to serve as a national voice for professional loggers. The Council is made up of a coalition of regional and state logging associations and councils and represents more than 50,000 employees and reaches over 10,000 logging contractors. Through networking and outreach, the Council seeks to enhance the logging profession and further sustainable forestry practices.

Associated Logging Contractors-Idaho is a trade organization of logging contractors. It currently has close to 400 logging contractor businesses as members and an additional 100 associate members who are affiliated with the timber industry and logging contractors. Its member companies are small, family-owned, or closely held businesses that operate on the forest lands of Idaho. Many are multi-generational businesses with close ties to the land and their communities. The Idaho forest industry makes up 4.6% of the total labor income in the state and produces $2 billion in annual sales of primary wood and paper products. The forest industry is an essential component of school funding in rural areas where unemployment exceeds 20%.

Associated Oregon Loggers represents approximately 1,000 contract logging companies and businesses associated with the logging industry in the State of Oregon. Its members are primarily small, family-owned businesses, many of which are owned and managed by second, third, and even fourth

generations of loggers. Members rely on a long-established transportation system (including forest roads) to move logs and other forest products from the woods to processing mills and other destinations.

The Buckeye Conservancy is an organization of family farm, ranch, and forest landowners and resource managers in the North Coast Region of California. The Conservancy is dedicated to the promotion, communication, and implementation of those ideals and policies that support the ecologic and economic sustainability of natural resources and open space in family ownership.

The California Forestry Association is a nonprofit, nonpartisan organization dedicated to sustainable uses of renewable resources and responsible forestry. Association membership includes forest landowners, forestry professionals, loggers, manufacturers, wholesalers, and retailers who are engaged in the production and distribution of wood products. These members own 3.8 million of the 7.4 million acres of private timberland in California and are committed to protecting and enhancing the natural life cycle of California's forests. They also supply wood resources by contracting to purchase and harvest significant amounts of timber from public lands including the national forests.

The Forest Landowners Association was established in 1941 to provide its members with education, information, and national grassroots advocacy, which enables them to sustain their forest lands across generations. Association members own and operate more than 40 million acres of forest land in 48 states. Through outreach on behalf of private forest landowners nationwide the Association seeks to

enhance forest land management and stewardship. The Association also provides advice, support, and information to policy makers, educating them on how proposed legislation could affect private forest management, stewardship, and owners' rights.

The Kentucky Forest Industries Association was organized in 1965 to promote the economic welfare and interests of Kentucky's wood industry by advocating conservation and sustainable forest use, and by working with agencies to promote the forest industry. The Association has a wide range of members (approximately 600) including landowners, sawmills, loggers, flooring companies, insurance companies, financial institutions, forest/heavy equipment companies, and numerous other support industries. Association members directly employ over 20,000 people with a large impact on the state's economy.

The Mississippi Forestry Association was founded in 1938 to promote landowner rights, environmental stewardship, member prosperity, and community understanding through educational outreach and advocacy. The Association has approximately 3,000 members including landowners, foresters, forest industry companies, hunting clubs, and others. Forestry and forestry products are a $19.2 billion industry in the state.

The Missouri Forest Products Association was established in 1970 to encourage the wise use and conservation of the Nation's resources through education and issue advocacy. The Association has over 300 members, comprised primarily of wood processing mills and logging businesses. Association members contribute more than $4 billion directly to

the economy with between $10-$12 billion in induced benefits.

The North Carolina Forestry Association was organized in 1911. The Association actively promotes healthy, productive forests by supporting the efforts of forest landowners and forestry-related businesses that responsibly manage or use forests and produce wood and paper products. The Association is primarily engaged in legislative and regulatory advocacy, environmental education, logger training, and education and public outreach. The Association has approximately 4,000 members, including forest landowners, forest managers, wood suppliers and loggers, and producers of wood and paper products. Forest products is North Carolina's largest manufacturing industry providing over 68,000 jobs with an annual economic impact of $23 billion affecting more than 180,000 jobs. Forest lands in North Carolina cover more than 18 million acres (59% of the state).

The Northern Arizona Loggers Association was formed in 1975 to promote forest industry professionalism, knowledge, and safety, primarily through training and education. The Association has numerous members made up of logging contractors and suppliers. Most are family-owned businesses vital to local rural economies. The Association reports that Arizona is currently in the bidding process on a proposed 750,000 acre forest restoration project (the largest in the Nation) and that requiring Clean Water Act permits for the estimated 2,000 miles of related forest roads could undermine the project.

The Ohio Forestry Association was founded in 1903 and became a trade association in 2008. The

mission of the Association is to support the management of Ohio's forest resources and improvement of business conditions for the benefit of forestry-related industries and enterprises, including the hardwood industry, logging companies, sawmills, pulp and paper mills, hardwood brokers, equipment sellers, consulting companies, foresters, and landowners. To that end, the Association engages in policy and legislative advocacy, education, and outreach. The Association manages the Ohio Master Logging Company Certification Program which is an outgrowth of Ohio's response to dealing with silvicultural activities as nonpoint sources of pollution. The Association works closely with state and local agencies to deal with voluntary compliance mechanisms and all participants believe the current approach is addressing Ohio's needs. On every Ohio Environmental Protection Agency (EPA) water quality assessment of pollution sources, silviculture is rated as of little concern. A 2005 report by the Ohio Division of Forestry and Ohio State University showed that Ohio's wood and fiber industry contributed $15.1 billion to Ohio's economy and employed 119,000 people with a payroll of $4 billion.

Oregon Women in Timber was organized in 1979 to create awareness and appreciation for the value of trees, and to encourage an understanding about protection, management, and conservation of renewable forest resources. These goals are furthered through educational programs (like the Talk About Trees program) in schools that provide instruction on ecology, forest management practices, and the use of wood products. Members consist of women associated with loggers, foresters, school teachers, mill employees, consultants, landowners, and others who are concerned about forest management. Oregon Women in Timber

are active participants in Oregon Women for Agriculture and American Agri-Women.

The Southeastern Lumber Manufacturers Association is a trade organization established in 1962 to promote family-owned lumber businesses. The Association represents lumber manufacturers in 17 states, primarily in the South. With emphasis on government affairs, marketing and management, and operational issues, the Association offers programs to support independent lumber manufacturers.

The Texas Forestry Association was founded in 1914 to enhance and perpetuate Texas forest resources through tree planting, education, training, and political action. The Association has approximately 2,855 members which include private landowners, professional loggers, consulting foresters, and processing mills. In East Texas alone forest lands are 94% privately owned and cover more than 12 million acres. Forestry is a major state industry.

The Treated Wood Council was established in 2003 to serve all segments of the treated wood industry in government affairs. The current membership is approximately 474 and includes wood product suppliers, wood preservative suppliers, wood treaters, and related organizations throughout the country. Member businesses have a $4.5 billion impact on the national economy and supply approximately 15,000 direct jobs.

The Virginia Forest Products Association was founded in 1958 to support and advance Virginia's lumber and wood products industry through public education and legislative and regulatory advocacy. The association has more than 200 members, primarily

small businesses, and represents those who produce lumber and wood products in the Commonwealth of Virginia as well as those companies that provide goods and services to these producers. Association members produce the majority of the lumber and wood products manufactured in Virginia. Virginia's forest industry ranks as one of the commonwealth's largest manufacturing sectors. A recent study by the Weldon Cooper Center found that Virginia forests provide more than $27.5 billion in annual benefits.

Washington Contract Loggers Association, Inc., is a trade association that represents over 700 logging companies within Washington State. Association members either own forest land, log for small forest landowners, or purchase standing timber from private or public landowners. The use of forest roads is vital to the logging industry.

Amici believe the Ninth Circuit's interpretation of the Clean Water Act and EPA regulations is unfounded and will unnecessarily impose heavy regulatory burdens on thousands of forest land owners and operators across the nation. For the first time in the history of the Act, channeled rainwater runoff will be regulated as a point source pollutant displacing long-established state water quality programs and driving up the cost of wood products. As attested above, forestry is a major state and national industry which the Ninth Circuit decision will hamper. The high cost of complying with a new NPDES (National Pollutant Discharge Elimination System) permit program will undoubtedly limit the use of forest lands and the availability of forest resources and impair the livelihood of small, family-run operations; a mainstay

of the industry. Therefore, Amici urge this Court to grant review and overturn the decision below.

INTRODUCTION AND STATEMENT OF THE CASE

It may be easy to forget that court decisions affect real people. In this case, the effect of the Ninth Circuit decision below is severe and far-reaching. It overturns more than three decades of regulatory practices nationwide and undermines settled expectations. For the first time since the inception of the Clean Water Act, channeled rainwater from forest roads now will be regulated as an industrial discharge requiring an NPDES permit. This is not insignificant. There are literally hundreds of thousands of forest roads throughout the Country and the cost of obtaining, processing, and complying with an individual NPDES permit can be expected to run to tens of thousands of dollars and months of work. And, the costs of permitting would fall primarily on small, private landowners in rural areas where the economy is depressed and joblessness is high.

But this is not all. The immediate effect of the Ninth Circuit decision is to put the EPA, the states, and the entire forest industry in limbo, unsure of the legal status of current forest road operations. The long-term effect is equally uncertain as it is unclear if, when, and how the EPA and the states will respond to the decision. As noted by the Petitioners, the court decision was based on a unique interpretation of the Act and agency regulations in conflict with other Circuit Courts of Appeals, without the EPA ever appearing as a party litigant.

Moreover, none of this was necessary to protect water resources. Nationwide, rainwater runoff from forest lands and forest roads has been addressed for decades under the Clean Water Act as nonpoint source pollution, minimized through time-tested "Best Management Practices" (BMPs) at the state level, implemented in some states through state forest practices regulations, all with EPA oversight.[2] EPA, state agencies, and stakeholders have found this state-based system of BMPs to be efficacious. However, the Ninth Circuit tossed out that system in favor of a wholly unworkable and redundant point-by-point permit program.

For these and other reasons, Amici believe review is warranted and should be granted.

SUMMARY OF ARGUMENT

The Ninth Circuit held that channeled rainwater runoff from forest roads is subject to NPDES permitting under the Clean Water Act as a point source discharge. *See Nw. Envtl. Defense Ctr. v. Brown*, 640 F.3d 1063 (9th Cir. 2010). That decision overturns more than 30 years of federal, state, and private forestry practice. In addition to the legal arguments raised by Petitioners, Amici believe there are equally compelling practical reasons for this Court to grant review.

Amici demonstrate below that the Ninth Circuit decision may require thousands, if not millions, of

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[2] *See* 33 U.S.C. § 1329 (nonpoint source management programs); http://www.epa.gov/owow_keep/NPS/cwact.html (last visited Oct. 2, 2011) (EPA nonpoint source program website); http://www.epa.gov/owow_keep/NPS/ forestry.html (last visited Oct. 14, 2010) (EPA website on nonpoint source BMP for forestry).

additional NPDES (Section 402) permits for forest landowners and loggers nationwide. Neither the states nor the EPA are equipped to handle the influx. The decision will engender an unprecedented number of permit applications that the agencies will be unable to process expeditiously, resulting in significant delays and costs for the regulated community.

A decision that has the potential to change an entire industry with potentially drastic effects on the economy and jobs warrants a look by this Court. Therefore, this Court should grant the petitions for writ of certiorari.

ARGUMENT

Court rules state that "[a] petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. The parties have identified compelling legal reasons for granting the petitions in this case; *i.e.*, to resolve a conflict among the Circuits and to address the Ninth Circuit's failure to apply the interpretive guidelines established by this Court in *Chevron U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984). However, Amici suggest some compelling practical reasons for granting the petitions.

I

THE PANEL DECISION WILL CREATE AN OVERWHELMING NUMBER OF PERMIT REQUESTS FOR MILLIONS OF MILES OF FOREST ROADS, LEADING TO TREMENDOUS AND BURDENSOME PERMITTING DELAYS

As an aid to this Court, Amici have compiled information reflecting the potential impacts of the decision below. This information establishes that the imposition of the NPDES (Section 402) permitting requirement for rainwater runoff from forest roads will produce unprecedented permitting costs and delays. Although this information is based on Amici's recent estimates, it is not unlike the data cited by the EPA in 1990 when it made a policy decision not to regulate rainwater runoff from forest roads as a point source under the Clean Water Act. *See* 40 C.F.R. § 122.26(b)(14); 55 Fed. Reg. 47,990, 48,011 (Nov. 16, 1990).

A. The Ninth Circuit Decision Will Result in a Significant Increase in the Number of NPDES Permitting Applications

If the Ninth Circuit decision is not overturned and EPA is forced to develop a rainwater permitting program for forest roads, that program could be developed on a per-landowner or a per-harvest basis. Under either scenario, however, a permit would have to authorize and impose meaningful effluent limitations on each permitted discharge, which may turn on the number of pertinent forest road water

conveyances. *Cf.* 33 U.S.C. § 1311(e) ("Effluent limitations . . . shall be applied to *all* point sources of discharge of pollutants . . . .") (emphasis added). Therefore, to provide a full picture as to the likely impact of the Ninth Circuit decision, Amici provide the following information.

1. National Data

There are 423 million acres of private forest land in the United States, owned by about 11 million individuals and entities. The vast majority of these owners—92%—are individuals or unincorporated entities. They control 62% of all private forest land, amounting to 264 million acres. Of the 264 million acres of family forest land nationally, 58% of those acres are owned by individuals who commercially harvest trees from their property. W. Brad Smith, *et al.*, *Forest Resources of the United States, 2007*, at 20 (2009).[3]

Based on the foregoing, there are approximately 150 million acres of family-owned forest land in this country that are used principally for tree harvesting. Assuming that an average tree harvest on this land would encompass 200 acres, and assuming that each of these harvests would require access to forest roads having some form of channeled water conveyance (a point source), there are 750,000 potential tree harvest sites for which a rainwater permit may be necessary.

Alternatively, the data can be analyzed on a per-landowner basis. Based on the foregoing statistics, there are approximately 10.1 million family forest

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[3] *Available at* http://nrs.fs.fed.us/pubs/7334 (last visited Oct. 2, 2011).

landowners in the country. In a recent survey, these landowners were asked to rate, on a scale of 1 to 7, how well a list of uses described the actual use of their working family forest land. From the survey, 30% of the landowners rated timber harvesting as the main reason for owning their forest land (*i.e.*, rating it 1 or 2). *See* Brett J. Butler, *Family Forest Owners of the United States, 2006*, at 16 (U.S. Forest Serv. 2008).[4] Assuming that these landowners would likely use their land in the future for tree harvesting, and assuming that each of these tree harvests would require access to forest roads having some form of water conveyance, it follows that there are approximately 3,000,000 family forest landowners who may be required to obtain an NPDES permit, under the Ninth Circuit's decision.

Finally, the national data can be analyzed in terms of the number of potential rainwater conveyances for which specific effluent limitations may have to be established as part of the permitting process. Although Amici do not have data readily available on the number of such conveyances nationally, Amici believe that a fair estimate can be extrapolated from regional data. For example, as shown in greater detail below, in the State of California there are approximately six miles of forest road per square mile of private forest land. As discussed above, 58% of the nation's 264 million acres of family forest land are held as working forests. Assuming, much more conservatively, a ratio at the national level of one mile of forest road per square mile of working family forest land, there are approximately 264 million miles of forest roads on working family forest land. Also in

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[4] *Available at* http://nrs.fs.fed.us/pubs/gtr/gtr_nrs27.pdf (last visited Oct. 2, 2011).

California, there are on average 2.43 water conveyance structures per mile of forest road. Again assuming, much more conservatively, an average ratio at the national level of one water conveyance per mile of family forest road, the estimated total that may require an NPDES permit is 264,000,000.

2. State Data

Here, Amici provide forest road information for selected states, primarily in the Ninth Circuit, that supports the national data provided above.

a. Washington

The State of Washington has approximately 22.1 million acres of forest land. *See* Smith, *supra*, at 153. Private landowners control approximately 7.8 million acres. Although complete data is not available for all of these acres, data covering 7.3 million acres of Washington's large private- and state-held forest lands reveal that these areas contain approximately 57,000 miles of forest road.[5] Based on a conservative assumption that the ratio of ditches or culverts to mile of forest road is one to one, the estimated total possible water conveyances associated with these forest lands that are potentially subject to NPDES permitting is 57,000. That number may significantly understate the total permitting sites, however, for two reasons. First, the figure covers only 33% of the total acres of forest land within the state. Second, the forest road data on

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[5] These data are derived from the Washington State Department of Natural Resources' records for Road Maintenance and Abandonment Plans. Washington state law requires forest landowners to file these plans with the state agency. *See* Wash. Admin. Code §§ 222-24-050 to 222-24-0511. Importantly, this data covers only large private holdings and state-owned timberlands.

which the figure is based applies only to those forest roads crossing fish-bearing streams; there are, of course, many more forest roads within the state that cross nonfish-bearing streams that would still be subject to NPDES permitting under the Ninth Circuit decision.

b. Idaho

Idaho contains 21 million acres of forest land. *See* Smith, *supra*, at 152. As an example of the Ninth Circuit decision's impact on that state, Amicus Associated Logging Contractors-Idaho reports that 650,000 acres of forest land in Northern Idaho (a very small percentage of the total forest land in the state) contain approximately 6,000 miles of roads. Further, there are approximately four culverts for every mile of forest road on this land. Therefore, the estimated number of water conveyances that are potentially subject to NPDES permitting for this small sample of Idaho forest land is approximately 24,000.

The Idaho Department of Lands manages roughly one million acres of timberland, representing 7% of the state's total. The Department estimates the total mileage of logging roads to be 7,741 miles.[6] The Department does not have current data on the number of water conveyances on its land. Assuming conservatively that the ratio of water conveyances per mile of state forest road is two to one (compared to a ratio of four to one for the privately owned Idaho forest land), then the estimated sites subject to NPDES permitting is approximately 15,400.

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[6] This data comes from the Associated Logging Contractors-Idaho.

c. California

Of California's *nonindustrial* private forest land areas, there are 4.1 million acres of productive, unreserved forest, which equals approximately 6,400 square miles of forest. Based on informal Amicus California Forestry Association (CFA) survey data of its members, there are approximately 6.19 miles of forest road per square mile of forest.[7] Thus, CFA estimates that, on California nonindustrial private forest lands, there are approximately 44,400 total miles of private nonindustrial forest road. Also based on CFA's survey data, there are on average 2.43 water conveyances per mile. Hence, the estimated total NPDES permitting sites is 107,000.

Of California's *industrial* private forest land, there are approximately 4.4 million acres of productive, unreserved forest, which equals 6,878 square miles of forest. Based on the survey data discussed above, there are approximately 6.19 miles of forest road per square mile of forest (equaling approximately 42,600 total miles of private industrial forest road), also with an average of 2.43 water conveyance structures per mile. Therefore, the estimated NPDES permitting sites on private industrial forest roads is 103,000.

Based on United States Forest Service data for California,[8] CFA estimates that there are 9.8 million

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[7] The range is 4.9 to 7.4 miles of road per square mile of forest.

[8] Although Amici do not represent federal agencies, Amici do have members who use or maintain forest roads on federal lands and, thus, would likely be responsible for bearing the cost of obtaining NPDES rainwater permits. Moreover, the number of federal roads that would be subject to the decision is important to the interests

(continued...)

acres of productive unreserved forest within the state under the Service's jurisdiction, equivalent to 15,312 square miles of forest.[9] CFA also estimates that these lands are covered by 46,800 miles of forest roads, and that these roads, depending on their use, can have up to 20 water conveyances per mile.[10] CFA estimates that 45% of the Service's California forest road miles—approximately 21,000—have culverts or ditches. Assuming that, of those roads having culverts or ditches, there are approximately 20 of such structures per mile of forest road, then the estimated number of NPDES permitting sites is 420,000. However, the Service's data include "cross-drains" among water conveyance structures. Generally, such drains do not deliver rainwater to streams or rivers, and thus would not be covered by the Ninth Circuit decision. Assuming conservatively that half of the Service's water conveyance structures are nonpermittable cross-drains, then the estimated total water conveyances associated with Forest Service forest

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[8] (...continued)
of Amici: the more permit requests filed (whether by governmental or private actors), presumably the longer it will take for permits to be issued.

[9] Forest Service data were provided to CFA in part by personal communications from various Forest Service engineering personnel.

[10] The reason for the discrepancy between private timberlands and Forest Service land (2.43 to 20) is that, for private California timberland owners, the practice has been to use outslopes and rolling dips to *disperse* rainwater, rather than culverts and ditches to *collect* water. The former would not qualify as water conveyance structures subject to NPDES permitting because they would not be considered point sources.

roads that are potentially subject to NPDES permitting is 210,000.

d. Alabama

To demonstrate the impact of the decision outside of the west coast states, Amici provide the following data on the State of Alabama. According to Amicus Alabama Forestry Association, Alabama is comprised of 22.7 million acres of forest land (68% of the state's land area). Alabama has the third most forest land in the 48 contiguous states, behind only Georgia and Oregon. There are 22.7 million acres of forest land in the state with 82% or 29,084 square miles in nonindustrial family ownership. Based on the assumed national figure of one water conveyance per road and one road per mile, there are an estimated 30,000 potential permitting sites in the state on private lands alone.

3. Summary

Based on the foregoing data, Amici estimate that the Ninth Circuit decision would result in an unprecedented increase in NPDES permit applications. At the national level, Amici estimate the decision will create an additional 3,000,000 permit applications, based on the number of affected landowners, or 750,000 applications, based on the number of tree harvests, or 264,000,000 point source discharges requiring permits. This places an astronomical regulatory burden on both federal and state agencies that oversee or issue NPDES permits. The state data compiled by Amici supports the national numbers. In Washington, Amici estimate that the decision may create an additional 57,000 point source discharges requiring permits. In Idaho, Amici estimate an

additional 40,000 point source discharges requiring permits. In California, Amici estimate that the decision may create an additional 420,000 point source discharges requiring permits. And, further east, in Alabama, Amici estimate 30,000 permit sites on private lands alone.

B. The Panel's Decision Will Impose Significant Costs on Industry Because of the Magnitude of the New Permitting Obligation

As the preceding section makes clear, the magnitude of the permitting requirement placed on forest landowners, as well as on federal and state enforcement agencies, is huge and potentially unworkable. The Ninth Circuit itself recognized that fact when it offered its "sympath[y]" with EPA over the consequences of its ruling. *See Nw. Envtl. Def. Center v. Brown*, 640 F.3d at 1085. Further, the attached declaration, submitted by James A. Hanlon, Director of EPA's Office of Wastewater Management in connection with *The National Cotton Council of America v. United States Environmental Protection Agency*, 553 F.3d 927 (6th Cir. 2009) (Appendix A (App.)), confirms that imposition of an NPDES permitting obligation of the magnitude discussed above would overwhelm EPA and the states and make it nearly impossible for forest landowners to obtain needed permits in a timely manner. Director Hanlon explains that, currently, there are over 400,000 NPDES permits administered by EPA and the states. *See* Hanlon Decl. ¶ 11, App. A-7-A8. In California alone, the number of permittable rainwater conveyances would exceed that number. Nationally, the estimated number of permittable sites would exceed that number *by more than 600 fold*. The

cost and time required to obtain similar "dredged and fill" permits under the Clean Water Act is already intolerable. As this Court has observed, "The average applicant for an individual [CWA Section 404] permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes." *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion). If obtaining a Section 404 permit for the placement of dredged or fill material can take over two years and cost nearly $300,000, it does not require much imagination to envision a similarly costly and time-consuming process for obtaining a Section 402 NPDES discharge permit resulting from the Ninth Circuit decision.

A worthwhile comparison can be drawn from EPA's experience in issuing a general rainwater discharge permit for shipping vessels. That permitting program was also the direct result of litigation. *See Nw. Envtl. Advocates v. U.S. EPA*, No. C 03-05760 SI, 2005 U.S. Dist. LEXIS 5373 (N.D. Cal. Mar. 30, 2005). The decision required EPA to create a permitting program for approximately 70,000 new discharging sources.[11] EPA needed *over two years* to devise an adequate program. *See* Hanlon Decl. ¶¶ 7, 11, 38, App. A-5, A-7, A-27-A-28. But one hesitates to guess how much time the agency would need to produce a permitting program for *over 200 million potential discharging sources*. And while the agency struggles to produce a new permitting program, forest road owners and operators will be put in an impossible situation:

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[11] *See* http://cfpub.epa.gov/npdes/vessels/background.cfm (last visited Oct. 14, 2010).

Continue with business as usual and run the risk of becoming a defendant in a citizen suit, *see* Hanlon Decl. ¶ 8, App. A-6—precisely what has happened in this case—or cease using forest roads and abandoning their livelihoods.

CONCLUSION

It is impossible to predict the actual impact the decision below will have on landowners and wood producers, or federal and state agencies. But it is possible to predict that the decision below will drastically change forest road practices with far-reaching impacts on jobs and the economy. In light of the legal questions raised by Petitioners, these practical considerations provide compelling reasons for this Court to grant the petitions and determine the proper scope of the Clean Water Act. Amici urge this Court, therefore, to grant review.

Respectfully submitted,

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Director of EPA's Office of Wastewater
Management in connection with
The National Cotton Council of
America v. United States
Environmental Protection Agency,
553 F.3d 927 (6th Cir. 2009) A-1

IN THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

THE NATIONAL COTTON COUNCIL OF AMERICA, et al.,	)
Appellant,	) Nos. 06-4630; 07-3180/ 3181/3182/3183/3184/ 3185/3186/3187/3191/ 3236
v.	)
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY	)
Appellee	)

DECLARATION OF JAMES A. HANLON

I, James A. Hanlon, declare that the following statements are true and correct to the best of my knowledge, information, and belief, and are based on my personal knowledge and information supplied to me by employees of the United States Environmental Protection Agency (EPA or Agency) under my supervision and information provided by my colleagues from EPA's Office of Pesticides Program (OPP).

INTRODUCTION

1. I am James A. Hanlon, Director of the Office of Wastewater Management in EPA's Office of Water. I have served as the Office Director since April of 2002. As the Director of the Office of Wastewater

Management (OWM), I direct the EPA office responsible for national program direction to the National Pollutant Discharge Elimination System (NPDES) permit program, including oversight of authorized State and Territorial NPDES programs. OWM has oversight responsibilities and provides technical assistance supporting EPA regional water programs. OWM also administers federal financial and technical assistance for publicly owned treatment works (e.g., municipal sewage collection systems and treatment plants). I supervise a staff of approximately 110 permanent full-time and part-time federal employees. OWM's annual program (operating) budget for fiscal year 2009 is approximately $28 million. OWM's operating budget also supports the management of State grants which total near $950 million.

2. Prior to my current position, I served as the Deputy Office Director of the Office of Science and Technology (OST) in EPA's Office of Water beginning in 1991. OST is responsible for the scientific and technical basis for federal water quality and safe drinking water programs, including establishment of national effluent limitations guidelines and analytical test methods. OST also provides scientific and technical support to other Offices with program implementation responsibilities within the Office of Water, including OWM, the Office of Wetlands, Oceans, and Watersheds, and the Office of Ground Water and Drinking Water. I have worked for EPA for more than 36 years. I received a Bachelor of Science degree in Civil Engineering from the University of Illinois and a Masters of Business Administration degree from the University of Chicago. I am a registered Professional Engineer in the State of Illinois.

3. I have read the Sixth Circuit Court of Appeal's Opinion of January 7, 2009, in National Cotton Council of America, et al., v. EPA. I understand that the Environmental and Industry Plaintiffs challenged EPA's Final Rule: Application of Pesticides to Waters of the United States in Compliance with FIFRA ("Final Rule") as codified at 40 C.F.R. 122.3(h), which excludes from NPDES permitting those pesticide applications consistent with FIFRA requirements that are applied to or over, including near, waters of the United States. As a remedy in this litigation, I understand that the Court has determined that the Final Rule should be vacated.

4. Since January 7, 2009, EPA has been analyzing the Court's decision and its impacts while also providing support to the states and communicating to sectors of the regulated community and environmental groups. I have heard first-hand the concern and confusion amongst the permitting authorities and pesticide applicators about who will be required to obtain a NPDES permit. EPA has determined that the Court's decision clearly impacts the following point source discharges to, over or near waters of the United States: discharges of chemical pesticides that leave a residual or excess and discharges of all biological pesticides. My staff has also worked with the OPP to clarify what pesticide use patterns will trigger a requirement to obtain an NPDES permit. At least the following large categories are covered when sprayed to, over, or near waters of the United States:

- Mosquito larvicides
- Mosquito adulticides

- Herbicides used to control weeds in lakes and ponds
- Herbicides used to control weeds in irrigation systems and other waterways
- Herbicides used to control weeds along ditch banks in agricultural drainage systems
- Insecticides used in wide-area insect suppression programs
- Herbicides used in wide-area control programs directed at aquatic invasive plant species
- Herbicides, insecticides and other pesticides used in forestry programs when applied over waters of the United States.

5. Using available information sources, OPP estimated the number of pesticide applicators and applications for the identified use patterns identified in paragraph 4. OPP estimates that these categories represent approximately 365,000 applicators and 5.6 million applications a year. OPP has also provided information to characterize the pest control needs which these pesticides address and the availability of other, nonpesticidal methods of controlling the target pests. Finally, OPP has provided information on the impacts of relying only on non-pesticidal methods of pest control. The information developed by OPP appears in Appendix A.

6. Because of the large number of similarly situated discharges, EPA intends to issue a general permit to cover pesticide discharges covered by the Decision. Individual permits are designed to address discrete discharges from fixed locations and would

require an individual public notice and comment period. In fact, I do not believe either EPA or states would be able to provide timely coverage to pesticide applicators using individual permits for nearly all of the types of pesticide applications covered by the Decision. Thus, as a practical matter, I believe that EPA and NPDES authorized states will not be able to provide applicators with a way to comply with the CWA's NPDES requirements without drafting a general permit for covered application of pesticides.

7. A vacatur will require EPA and authorized states and territories to immediately develop NPDES permits that comply with NPDES regulatory requirements found in 40 CFR Part 122 and described in more detail below. This process will take 2 years to ensure that all necessary NPDES permit requirements are met. This estimate is partly based on EPA's recent experience in issuing the NPDES general permit for vessel discharges, which took over 2 years to complete. Similarly, as discussed below, EPA is suggesting 24 months to develop a final NPDES pesticides general permit, including the time to work concurrently with authorized states and territories to draft and finalize their general permits simultaneously with EPA. When EPA issues an NPDES permit, it is only effective in non-authorized states (4), in territories, Indian Country, and on federal facilities. It is very important that the authorized permitting authorities keep in step with EPA to ensure national compliance with the CWA. A stay would provide EPA and NPDES authorized states and territories the time necessary to

develop, propose, and implement an NPDES permit that would satisfy the CWA requirements.[1]

8. Vacatur of the rule before a NPDES permit can be issued by the permitting authority would place pesticide applicators in a vulnerable position where they would be subject immediately to potential citizen suits for violating the CWA if they discharge pesticide pollutants to, over or near waters of the United States. Moreover, the intentional discharge of pollutants without a permit could technically subject an applicator to criminal liability under the CWA, however, EPA would not expect criminal charges to be brought during the time period prior to NPDES permitting authorities being able to make a permit available for pesticide applicators. Significant harm to public health could result if applicators choose not to apply pesticides in order to reduce the risk of liability. Some states have informed us that applicators in their states would not apply pesticides after the mandate in this case issues and prior to when a NPDES permit is available. A stay of the mandate until April 9, 2011 would prevent disruption to mosquito abatement programs, farming operations, forest management, irrigation districts, and other pemittees.

9. For the reasons set out in this Declaration, I believe that the immediate vacatur of the Final Rule would cause significant disruption to both EPA's and authorized states' NPDES permitting programs, as well as the regulated community and others including

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[1] EPA has authorized 46 States and 2 U.S. Virgin Islands to implement the NPDES program. Where, in this declaration I refer to authorized states, I am referring to the authorized states and the U.S. Virgin Islands.

federal agencies. First, I will provide a detailed description of the significant adverse effects arising from an immediate vacatur. Second, I will'explain the time intensive NPDES permit development process that gives rise to EPA's request that the Court stay the mandate until April 9, 2011 (24 months).

ANTICIPATED IMPACTS TO EPA AND NPDES AUTHORIZED STATES AND TERRITORIES IF THE MANDATE ISSUES BEFORE NPDES GENERAL PERMIT IS ISSUED

10. The mandate, if it issues prior to the availability of an NPDES permit, will effectively prohibit the discharge of almost all pesticides to, over or near waters of the United States. This would result in substantial disruption for both EPA and the 47 authorized NPDES permitting authorities. If the Court's vacatur were to take effect before EPA and authorized states and territories are able to issue NPDES general permits, significant numbers of pesticide applicators would immediately be faced with discharging without a permit. There are significant legal risks (third-party citizen suits) for any person determined to be discharging a pollutant into waters of the United States without a permit. Given these risks, I would predict that significant numbers of pesticide applicators would seek to obtain NPDES permits immediately upon issuance of the mandate, where the permitting authorities would not be prepared to respond.

11. NPDES authorized permitting authorities are concerned about whether they will have adequate resources to issue newly required permits that could potentially include hundreds of thousands of

applications in each state. The current universe of point sources requiring NPDES permits to discharge includes individual and general permittees. Nationally, approximately 45,700 facilities are authorized to discharge under individual permits. Another 120,000 facilities (including 70,000 vessels) are authorized under general permits for non-storm water discharges. Until the recent inclusion of the 70,000 vessel dischargers, in general, the universe of non-storm water permittees remained more or less stable since the inception of the NPDES Program in 1972. The 1987 CWA amendments established NPDES permit requirements for storm water discharges and the number of permits for stormwater discharges has increased significantly since then. EPA's 1990 and 1999 actions to promulgate the NPDES regulations for storm water substantially expanded the universe of point sources subject to NPDES permit requirements. Today, approximately 7,000 municipalities (approximately 1000 in 1990 and another 6000 in 1999) require NPDES permits for discharges from municipal separate storm sewers; 270 of these need individual permits. Approximately 96,500 industrial storm water point sources need permits. Approximately 250,000 point sources of storm water associated with construction activity require permits each year. Thus, the current total universe requiring NPDES permits (whether individual or general) is approximately 411,470 facilities. While most of the latter storm water discharges are authorized under general permits, more federal and state employees, resources, and expertise are now required to effectively manage the NPDES Program than ever before.

12. State governments have not matched the increased NPDES permitting work load with an increase in State environmental budgets. States have indicated that their environmental budgets have either been static or in decline for many years. In February 2003, the National Academy of Public Administrators confirmed an analysis by State environmental administrators demonstrating a budget shortfall of between seven hundred million to one billion dollars for implementation of State CWA programs. *Understanding What States Need to Protect Water Quality*, Report by a Panel of the National Academy of Public Administrators for the U.S. Environmental Protection Agency (2003). States generally have even fewer resources today. While the resources from the American Recovery and Reinvestment Act of 2009 will help fund needed infrastructure projects, additional funds under this Act are not available for NPDES activities. At the federal level, available resources for NPDES oversight activities have declined as well. In addition to increased numbers of point sources needing permits, other factors have increased pressure on NPDES permitting authorities including: (1) more complex legal challenges to entire programs and permits from the public, environmental groups, and industry; (2) increasing complexity of certain types of permits stemming from more sophisticated water quality-based regulatory requirements; (3) high employee attrition rates in NPDES permitting staff, particularly state employees; and (4) declining federal grant funding, in real terms, that has historically augmented the operating budgets of state permitting agencies.

13. In past efforts to bring new categories of point source discharges into the NPDES permitting

program, EPA has built in time to allow states to update their NPDES programs to address the new category prior to requiring permits for that category. EPA has spoken with the states and they anticipate needing at least 24 months in order to develop and implement a federally compliant program, with a longer time being needed if state statutes or regulations must be revised prior to permits being issued to pesticide applicators.[2] I acknowledge the need to issue and implement this general permit in an expedient manner. Under ideal conditions, EPA would build time onto the end of EPA's general permit process to enable states to model their general permits on EPA's. However, in order to expedite the process, here EPA plans on working concurrently with the states so they may simultaneously be working on their general permits.

ANTICIPATED IMPACTS TO PESTICIDE USERS IF THE MANDATE ISSUES BEFORE NPDES GENERAL PERMIT IS ISSUED

14. Pesticide users are concerned with what applications will be covered and how the upcoming spring spraying season will be affected. Pesticide users are extremely concerned that once the mandate is

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[2] EPA usually allows State programs one to two years to modify their programs, which includes EPA review and approval. This time is necessary for states to conform to changes in the Federal program. The timeframe typically depends on whether changes are required to State regulations or to statutes. See, e.g., 40 C.F.R. §123.62(e). Most states will not have to modify their regulations because they can issue NPDES permits for pesticide applications covered by the Decision under their current authorities.

effective, they will become immediately subject to the requirement to have an NPDES permit and without one, will be subject to enforcement, and/or liable for citizen suits. If a pesticide applicator is required to have an NPDES permit, but cannot obtain one because the permitting authority is unable to issue a timely permit, an applicator would face a difficult choice. If the applicator chooses to apply the pesticide, he would risk being in violation of the CWA which would expose him to penalties of up to $32,500 a day. Alternatively, an applicator could decide not to apply a pesticide. The impact of not using a pesticide would depend on many factors, including the type and extent of the pest problem, the nature of the harm caused by the pest, and whether non-pesticidal alternatives were available to address the pest problem. The Court's vacatur will potentially affect many types of pesticide applicators who are not accustomed to obtaining NPDES permits while also requiring permitting authorities to develop and issue NPDES permits for a class of dischargers that they have little experience permitting.

15. The sheer number of applicators requesting NPDES permits will be significant. Although EPA is still considering aspects of the Court's decision that will ultimately affect the scope of the general permit, the Decision will clearly require large numbers of pesticide applications to be covered under an NPDES general permit. At the very least, when the Court vacates the Final Rule, NPDES permits will be needed for each pesticide application that is applied directly to or over waters of the United States to control pests. Examples of such pests include mosquitoes, which transmit infectious diseases such as encephalitis and West Nile Virus, gypsy moths, which defoliate forests causing growth loss or the death of trees; algae and

weeds, which can clog irrigation canals reducing the amount of water available to irrigate crops; and invasive species such as zebra mussels, which attach to and block water intakes for municipal water supplies and hydroelectric plants. Information from OPP shows that as many as 365,000 applicators perform more than 5.6 million of these types of applications annually, and would hence need NPDES permit coverage.

ACTIVITIES PROJECTED TO BE IMPACTED BY A NPDES GENERAL PERMIT

16. To illustrate the magnitude, I have included the following information developed by OPP on the impacts of premature vacatur of the EPA Final Rule on mosquito control programs in the United States. According to OPP, there are approximately 1200 Mosquito Abatement Districts (MADs) and other agencies in the United States that apply mosquito control pesticides, and we estimate conservatively that each MAD employs at least one applicator. In addition, OPP's analysis of available information, including information from the National Agricultural Aviation Association, Florida Coordinating Council for Mosquito Control and EPA data, indicates that there are 99 million acre treatments with adulticides per year and 4 million acre treatments with larvicides. (An acre treatment represents a single application of a pesticide to an acre of land or water. Multiple applications to the same acre result in multiple acre treatments.) Based on information from these data sources on the distribution of aerial and ground applications made, and the number of acres treated per application by air and ground, there are approximately 461,000

applications with adulticides and 19,000 applications of larvicides per year. Together, the instances of adulticide applications, and the instances of larvicide applications yield the total estimate of 480,000 pesticide applications made annually by MADs and other agencies involved in mosquito control.

17. Programs to control mosquito populations are important for protecting public health. Although most types of mosquito-transmitted diseases have been eradicated from the United States, mosquitoes still carry some types of disease-causing organisms which they can transmit when they bite people or animals, notably including various forms of encephalitis, West Nile Virus, and dengue.[3] Disease carrying mosquito species are found throughout the U.S., especially in urban areas and coastal or in inland areas where flooding of low lands frequently occurs.

DEVELOPMENT OF A PROPOSED GENERAL PERMIT[4]

18. The development of a legally defensible general permit for covered pesticide discharges will be a complex process that requires in-depth analyses of technical issues, including the technology options used by pesticide applicators and the impact of their applications on water quality. NPDES permit requirements

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[3] A more in depth discussion of these types of diseases can be found at: Joint Statement on Mosquito Control in the United States from the U.S. Environmental Protection Agency (EPA) and the U.S. Centers for Disease Control and Prevention (CDC), at: http://www. epa.g ov/opp00001/health/mosquitoes/mosquitojoint. htm

[4] [No text in original]

can be found at 40 CFR Parts 122. The requirements for approved NPDES state programs can be found in 40 CFR Part 123. Permit procedures can be found in 40 CFR Part 124. These regulations apply to EPA and to EPA NPDES programs administered by 47 state authorities.

19. The process to develop a general permit takes time (40 CFR Part 122, Subpart C). The development of a NPDES permit for pesticide pollutant discharges will require in-depth environmental and technical analyses. The permitting authority must identify the types of pesticides and applications that need permit coverage, and develop permit conditions necessary to meet the CWA requirements. The permitting authority must give public notice of a draft permit, provide for public comment, and respond to those public comments prior to issuing the permit. In parallel to these efforts, EPA the Agency plans to work with the state permitting authorities to assist them in developing their NPDES general permits. In addition, it is imperative for EPA and authorized states to inform and educate the regulated community regarding the permit requirements and the process to obtain permit coverage before the Court's mandate issues. As explained in this declaration, EPA estimates this administrative process to develop, propose, issue, and implement general permits will take until April 9, 2011, or 24 months to complete.

20. EPA must adhere to the following critical steps described below in order to develop permit conditions and requirements that comply with the NPDES regulatory requirements. Most of these steps are necessarily sequential under EPA regulations governing the permitting process. However, EPA is

committed, where possible, to conduct tasks concurrently with other tasks to reduce the length of time it will take to complete the process. That process requires rigorous information gathering, collaboration with a variety of EPA experts, and careful technological and scientific analyses. The analyses will provide EPA with the critical information it needs to develop a technically sound general permit and meet the NPDES statutory and regulatory requirements found at 40 CFR Parts 122 and 125.

21. Identify information needs, collect and analyze data. The first step in the development of an NPDES general permit is to collect the data necessary for a preliminary understanding of the scope of the universe of sources that might be permitted, existing practices used by and controls on those sources, and the possible technology-based and water quality-based requirements that might be included in one or more NPDES permits for those sources. EPA has begun to collect a wide variety of information and will continue to do so as it develops permits for pesticide applicators. EPA will continue to engage in the following activities to collect and/or analyze the necessary information:

- Collection and review of information about pesticide labeling requirements and other aspects of the FIFRA program from EPA employees with expertise in pesticide regulations under FIFRA and by EPA employees with an expertise in the NPDES permit program under the CWA.
- Review existing data on the effects of the relevant pesticides on water quality.

- Review existing state permits and other authorities that regulate pesticides and the extent to which they meet federal requirements.
- Collect and analyze data on the number of pesticide applicators and applications.
- Collect and analyze data on existing state water quality standards for pesticides, waters designated as impaired by these pesticides and any total maximum daily loads for pesticides.
- Review pesticide use patterns and analyze the extent to which different permits or requirements would be appropriate.
- Analyze the extent to which existing pesticide labels require an integrated pest management approach to pesticide use, including consideration of the least toxic alternative.
- Review whether special permit requirements will be necessary to address inert ingredients and adjuvants.
- Review the types of application equipment and best management practices employed to minimize the impact of pesticides on water quality.

In my experience, the time it takes to develop and analyze such data can be lengthy and averages between 12 and 18 months, depending on the complexity of the universe to be permitted, in order to draft permit conditions and limitations (40 CFR Parts 123.43 and 123.44). In light of the urgency that would

be created by the Court's vacatur, I estimate that a minimally adequate effort to identify information needs, and collect and analyze data could be performed in 3 months.

22. EPA's Office of Pesticide Programs (OPP) has an extensive database on the toxicity, environmental fate, and other properties of pesticides. In addition, under FIFRA, which OPP administers, any person who produces a pesticide must report annually on the identity and amount of pesticide product produced. This information, together with data from USDA and private sources, give EPA a general understanding of the amounts of pesticide production and usage. Finally, OPP has additional information concerning equipment used to apply pesticides, methods of integrated pest management techniques, and other aspects of pesticide use that may be relevant to the development of a CWA general permit.

23. While OPP has collected a significant amount of data about pesticide usage and ingredients, it is critical for OWM to synthesize and analyze this data for CWA regulatory purposes because OPP data has been analyzed only under FIFRA.

24. Scope and define universe to be permitted. Because EPA will be developing a program for pesticide applicators who have never before had NPDES permits, it is EPA's experience that there will be "gray areas" that will require EPA to make decisions about whether some categories of pesticide applicators are or are not required to have an NPDES permit. EPA will need to clarify which applicators are eligible to be covered under the general permits developed by EPA. After analyzing the appropriate information and making preliminary decisions regarding the potential

requirements likely to be required of certain categories of pesticide applicators, EPA will need to decide whether it will be necessary to develop different permits for specific subcategories of pesticide applicators. This process will most likely take place concurrently with the data analysis process described above.

25. Develop draft permit and fact sheet. Prior to issuance of an NPDES permit, EPA or an approved state must develop a draft permit and fact sheet that explains the basis for the requirements and conditions in the draft permit. *See* 40 CFR 124.8(a). EPA must provide notice of these documents to the public and give the public an opportunity to comment on them. See 40 CFR Part 124.10. The development of these documents requires EPA to develop the permits' technology-based effluent limitations, any more stringent effluent limitations necessary to protect water quality, monitoring and reporting requirements and, standard and special conditions. These are discussed below. In my experience, in order to prepare a draft permit that will be developed sufficiently to allow for meaningful public comment and a legally defensible final permit, there must be several iterations of preliminary draft documents by the EPA workgroup, discussions with knowledgeable stakeholders and management review and decisions. I anticipate that this process will extend approximately 6 months beyond the initial data collection period.

26. Develop technology based effluent limitations. EPA will need to develop the technology-based permit limitations for the permit. The CWA requires that such permit limits reflect the "Best Available Technology Economically Achievable" (BAT). *See*

33 U.S.C.A §1311(b)(2)(A). Because there is no national effluent limitations guideline for pesticide applicators, EPA will need to develop technology based effluent limitations on a "best professional judgment" (BPJ) basis considering the same factors applicable to the development of an effluent guideline. 40 CFR 125.3(c) (2). This process will begin during our initial data analyses, depending on what data is received.

27. Develop water quality based effluent limitations, if and where necessary. An NPDES permit may not authorize a discharge that will cause or contribute to the violation of water quality standards. *See* 33 U.S.C.A. §1311(b)(1)(C). Because water quality standards are state specific, whether a discharge would violate water quality standards can vary from state to state. An NPDES permit must contain a water quality based permit limit if there is a reasonable potential for the discharge to cause or contribute to the exceedance of a water quality standard. *See* 40 CFR Part 122.44(d). For pesticide applications, such limitations might include limitations on the time of applications (e.g., fish spawning season) and limitations on where pesticides could be applied (e.g., not near drinking water intakes or in outstanding natural waters). EPA will need to review the water quality standards in each state for which it will be issuing a permit and determine whether additional limitations are needed to protect water quality. This exercise will take place concurrently with the critical steps described above.

28. Monitoring and reporting requirements. Permits must specify all monitoring and reporting that the permittee must perform. *See* 40 CFR 122.41(j). Such requirements vary depending on the nature of the effluent limitations in the permit. EPA will make

efforts to ensure that any such requirements provide information that is useful and does not duplicate reporting that is being required under other state or federal laws. EPA is required by the Paperwork Reduction Act to develop an Information Collection Request (ICR) that estimates the burden of collecting and reporting information required by EPA. 44 U.S.C 3501, et seq. The estimate must be based on estimates of the number of permittees and the average cost of the burden imposed on individual permittees. The ICR is made available for public comment along with the draft permit. EPA is required to consider the public comments, revise the ICR as appropriate, and then forward the ICR to Office of Information and Regulatory Affairs at the Office of Management and Budget (OIRA), which again provides public notice. The draft ICR process will be prepared while preparing the proposed general permit.

29. Standard conditions and special conditions. All permits contain standard conditions that are required by 40 CFR Parts 122.41 and 122.42 and which delineate the legal, administrative and procedural requirements of the permits. Because they are "standard", EPA does not expect to need significant time to develop these for the general permit. Special conditions, on the other hand, may take considerable time to develop. Special conditions are non-numeric limits that require the permittee to undertake activities designed to reduce the overall quantity of pollutants being discharged, or to reduce the potential for discharges of pollutants. As is described in the U.S. EPA Permit Writers Manual at page 137, special conditions may be used for "facilities discharging pollutants for which data are absent or limited such that derivations of technology or water quality-based

effluent limitations are difficult or impossible." Special conditions may contain preventative requirements such as best management practices. They also may impose additional monitoring requirements or special studies that provide the permit writer data to evaluate the need for changes in permit limitations. Because of the unique challenges of, and EPA's lack of experience with, developing NPDES permits for the pesticide applicators, EPA may need to expend considerable effort considering the need for and developing special conditions for the permit.

30. Public notice and public hearings. After EPA finishes drafting the proposed general permit, it is required to issue a public notice of the draft permit and to provide the public a minimum of 30 days to comment on the permit. 40 CFR 124.10. If a hearing is scheduled, the comment period is automatically extended until the close of the hearing. 40 CFR 124.12(c). A hearing is required whenever there is significant public interest expressed during the comment period. I anticipate such interest and therefore EPA will most likely hold a hearing. Based on this anticipated interest, I believe there would be a benefit to providing a longer comment period such as the 90 days that EPA often provides for significant actions. This would also allow EPA an opportunity to schedule public hearings during the comment period and for commenters to then be able to include information presented at those hearings in their comments. This process will begin immediately after the draft general permit is completed and ready for publication. I anticipate that this process will take 3 months.

31. Respond to comments and develop Administrative record. At the close of the comment period on the proposed general permit, the work group must review the comments to determine whether appropriate changes to the draft permit should be made.[5] Even if comments do not result in such changes, EPA must prepare a written response to all significant comments. The time it takes to respond to comments is dependent on the number of comments and the complexity of the issues that are raised. For example, in response to the Federal Register Notice for the draft NPDES general permits for discharges incidental to non-recreational vessels, EPA received over 1600 comments and more than 10,000 pages of government reports and publications, scientific papers, and other information. The response to comment document which responded to all significant comments regarding the Vessels General Permit was 1,273 pages long and took four months of intense effort to complete. I anticipate a similar or greater level of public interest in a general permit for covered pesticide applications, ultimately, requiring as much, if not more of a significant effort to respond to comments as was required for the Vessels General Permit. During this period, the

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[5] EPA intends to form a workgroup of co-regulators. The goal for this workgroup will be to provide EPA information on state pesticide permit programs, what works, what doesn't, and identify any state Agency barriers that could impede a state's timely issuance of Pesticides General Permits and/or processes that must be employed to remove these barriers. EPA will also confer with Association of American Pesticide Control Officials (AAPCO) and the State FIFRA Issues Research and Evaluation Group (SFIREG). AAPCO is an association that encourages uniformity among the states in their pesticide regulatory programs. Its members consist of state and federal pesticide regulatory officials.

Agency will also revise the permit fact sheet and other analyses in light of comments received. I estimate that EPA will ,require 8 months to respond to comments and develop and publish a final permit. During this time, EPA will simultaneously perform related activities that various statutes require before the permit is final and which are described below.

32. CWA § 401 Certification. Under CWA § 401, EPA may not issue an NPDES permit unless it has obtained a certification (or a waiver of certification) from States, Territories, and certain Tribes where discharges authorized under the permit occur, regarding whether an authorized discharge will comply with their water quality standards or other appropriate requirements of their law. EPA must send letters to the certifying jurisdictions requesting written determinations regarding certification under CWA § 401. EPA will notify the certifying jurisdictions that EPA may not issue a permit authorizing discharges into their waters until the certifying agency has granted certification under CWA § 401, or has waived its right to certify by not responding to the request for certification within 45 days from the date the draft permit was mailed to them. In addition, EPA will notify the certifying jurisdictions of the statutory and regulatory requirements applicable to CWA § 401 certifications, including the requirement that certifications must contain any specific conditions necessary to assure compliance with their water quality standards or other appropriate requirements of their law. 33 U.S.C. § 1341(d); 40 C.F.R. § 124.53(e)(1). States may publicly notice and solicit comment on their 401 certifications. This process will take a minimum of two months but will occur during the period when

EPA is developing the response to comments on the draft permit and preparing the final permit.

33 Coastal Zone Management Act. Similarly, EPA may not issue a general permit authorizing discharges into waters of a State until after determining whether its action is consistent to the maximum extent practicable with the enforceable policies of approved State coastal zone management programs under the Coastal Zone Management Act ("CZMA"). 15 C.F.R. 930.31(d) and 930.36(e). EPA consults on its consistency determination with the affected State(s). A State may respond to EPA with conditions to the general permit that allow the State to concur with EPA's consistency determination. If EPA does not incorporate the State coastal zone management agency's conditions into the general permit or if the State coastal zone management agency objects to the general permit, then the general permit is not available for use by potential general permit users in that State unless the applicant who wants to use the general permit provides the State agency with the applicant's consistency determination and the State agency concurs. 15 C.F.R. 930.31(d). The National Oceanic and Atmospheric Administration (NOAA), the federal agency that administers the CZMA, has explained that "a State objection to a consistency determination for the issuance of a general permit would alter the form of CZMA compliance required, transforming the general permit into a series of case by case CZMA decisions and requiring an individual who wants to use the general permit to submit an individual consistency certification to the State agency in compliance with 15 CFR part 930." 71 FR 788, 793. In any State that has not provided conditions for incorporation into the permit, as well as any State that

has not objected to the permit, EPA's CZMA compliance requirements derive from CZMA section 307(c)(1). Id. I expect that this process will occur simultaneously with the 401 certification process.

34. Endangered Species Act Consultation: Concurrent with the development of the proposed general permit, EPA will devote substantial resources to fulfilling its obligations under the Endangered Species Act (ESA), if EPA determines it is necessary. The ESA requires Federal agencies to ensure that the actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of their designated critical habitats. Pursuant to ESA § 7(a)(2) and its implementing regulations at 50 C.F.R. § 402.14(c), EPA will submit a request for consultation package to the National Marine Fisheries Service and the U.S. Fish and Wildlife Service ("Services") regarding the issuance of the Pesticides General Permit, if EPA determines that consultation is indicated because of the nature of activities that may take place under a permit. EPA intends to develop a biological evaluation using the best available scientific and commercial data to analyze the potential effects of the proposed general permit upon listed species or critical habitat and a description of relevant listed species and their designated habitat. EPA will support the Services on their development of a biological opinion, if one is necessary. This will be a significant endeavor since the Pesticides General Permit will cover at least 500 active ingredients and as many as 900 inert ingredients. We estimate that it will take the entire length of the stay for the Endangered Species Act consultation, if it is determined to be necessary.

35. Issue final permit. The final general permit and supporting materials will reflect appropriate resolution of comments received and issues raised following the proposal. The final general permit will undergo an internal review process. A notice will be prepared that will be published in the Federal Register. This process will take place during the 8 month period identified above, which includes: response to comments, 401 certification, CZMA determination, preparation of the final Information Collection Request and OMB review of the Information Collection Request.

36. Implementation: EPA believes additional time is required after the final issuance of the general permit to make the regulated community aware of its terms and conditions. Given that most applicators will not have ever been subject to an NPDES permit, and depending on what the final permit requires, applicators will need time to bring their practices into conformance with the final permit. The general permit will specify whether or not some or all applicators must file a Notice of Intent prior to being covered by the general permit. Notices of Intent to be covered by a general permit often must be accompanied by documents that describe the permittee's best management practices or other plans that the permittee will implement. The permittee would need time to develop and submit such documents. Although I can not predict the extent to which the final general permit will impose requirements that will take time for applicators to be able to comply with, I estimate that 4 months would be a minimally reasonable ti me to educate applicators and allow them to come into compliance with the terms of a new general permit. Four months will also provide time to non-federal

authorized permitting authorities to issue and begin implementing their final general permits.

37. I am aware that twenty-three states have developed permits to cover some types of pesticide discharges. I am aware California issued its general permit on an emergency basis four months after the Headwaters decision to authorize certain short term and seasonal discharges of pesticide pollutants by public entities for resource or pest management. Additionally, the State of Washington issued its general permit 15 months after the Headwaters decision to authorize certain pesticide applications directed to aquatic plants. However, these permits cover only a specific subset of the universe of applicators and pesticides that will likely be covered by the general permit that EPA issues, such as pesticides for the control of weeds, algae, mosquitoes, nonindigenous fish, crustaceans and insects. Additionally, EPA must meet the rigorous statutory requirements outlined above. The estimated time that EPA is requesting the Court to consider reflects the additional time needed to develop, propose, and issue a general permit for all pesticide applications that are covered under the Opinion. My staff is evaluating the scope of these permits, their provisions, and requirements for maintaining and protecting water quality and compliance with the CWA. Thus, the time frames in which these two States issued their general permits do not represent the time needed by EPA and the States to issue permits in response to this Decision.

PAST EPA EXPERIENCE IN ISSUANCE OF VESSELS GENERAL PERMIT

38. As briefly discussed above, EPA recently issued the Vessels General Permit. That permit, which

also addressed a category of discharges that had previously been exempt, is a useful illustration of the general permitting process and the time necessary to draft a general permit. I believe a similar amount of time is necessary to develop, propose, and issue an NPDES general permit for point source discharges of pesticides. The Vessels General Permit was a result of litigation over a long-standing EPA regulation that excluded discharges incidental to the normal operation of a vessel from the need to obtain a NPDES permit. The Vessels General Permit covers discharges incidental to the normal operation of vessels. The Vessels General Permit took over two years to propose and finalize. I have no reason to believe that this process would be any faster or simpler for pesticide discharges subject to the Court's decision.

SUMMARY OF TIME REQUESTED TO STAY THE MANDATE

EPA estimates that it needs until April 9, 2011 before the rule is vacated to develop, propose, and take final action to issue an NPDES general permit that would be consistent with and satisfy the CWA requirements. In developing the NPDES General Permit for Pesticide Applications we will work closely with authorized states and will encourage them to develop their general permits concurrent with the development of EPA's draft general permit to expedite implementation.

CONCLUSION

I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge and belief.

Executed on April 8, 2009

/s/ James A. Hanlon